No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and ANTOINETTE BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

APPELLANTS' REPLY BRIEF.

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I.

Introduction.

We are concerned in this case with an award of $12,000 for an hour and a half or two hours' services to a vessel worth about $112,000, in calm weather, without substantial danger to the salvor. It can hardly be disputed, and—so far as we can tell from appellee's brief—it is not disputed, that this is a very large award.

It is our contention that the size of the award is due to various errors and is itself an error. Appellee has sought to meet our contentions in respect to these errors in various ways, to which we will advert hereafter. But, *appellee has made no substantial attempt affirmatively to justify the award for the services.* He has denied the

merit of our criticisms, and he has denied the applicability of the precedents we have cited. *But no precedents of comparable awards for like services to vessels of like value are referred to.*

If there had been prior authority for this award, we may be sure that we would have heard of it. Taken on appellee's own showing, this award is, as we have contended, without precedent. An award which departs from "the path of authority" is erroneous. This one is over four times greater than could be justified under any comparable case of which we are aware.

It is true, as counsel states, that every salvage case stands on its own facts, and that there is no rule of thumb that can infallibly produce a just result in every situation. But this does not mean that precedents will be altogether ignored. On the contrary, as we have pointed out in our opening brief, even if there were no other error, an award that departs widely from the general pattern marked out by the reported decisions may and should be modified for that reason alone.

But here there *were* other errors—errors which require the reversal of the District Court's decision, and call for the reappraisal of the award, unfettered by any principle that a trial court's discretion will not be lightly disturbed.

II.

Appellee Concedes the Materiality of Other Assistance, and That This Was Not Considered: His Counsel's Consideration of Other Assistance Is No Substitute for Consideration Thereof by the Court.

The first specific error of law urged by us is that the trial court erred in failing to consider the availability of assistance by the SUNLIGHT. The error is of twofold significance: *first,* as itself comprising a reason for excess in the award and an occasion for reduction of it; and, *second,* because if such an error of law was made, the award is reviewed without benefit of presumption as to correctness.

Counsel for appellee does not, of course, assert that this factor was considered, since no reference is made to it in the opinion or the findings. And, he concedes that it is a factor which should be considered. He states:

> "Availability of other assistance is just one of the factors *to be considered in making a salvage award.*" (Appellee's Br. p. 5.)

And again, he states on page 9 of his brief that other assistance is "a subsidiary factor, *not to be ignored,* but not to be given great weight."

We do not contend, of course, that the availability of such assistance is the sole factor to be considered. We agree with counsel that it is one of the factors which should be considered, and that certainly, in his words, it is "not to be ignored." We do not know just what counsel means when he states that it is not to be given great weight—in *The Monticello* (D. C., N. D. Cal.) 81 Fed. 211, it was stated to be "an important element"; in *The John J. Howlett* (D. C., E. D. Pa.), 256 Fed. 971, 972, it was said to be a "feature of importance"; and in *The Wahkeena,* 56 F. (2d) 836, this Circuit Court of Ap-

peals stated that availability of other assistance was a matter which goes "to the value of the appellee's services." This is weight enough for us. The decisions of this Court in *Rodriquez v. Bagalini,* 17 F. (2d) 921, and in *The Loch Garve,* 182 Fed. 519, are clear enough that, if the trial court ignores matters which "should not be ignored," its award will be modified. What other result, indeed, could follow?

Appellee criticizes us for citing harbor salvage cases as bearing on the significance of other assistance. But the foundation of the rule that harbor salvage carries a low rate is the fact, as has many times been stated, that assistance is abundant in harbors, and this plainly appears in the very quotation taken by appellee from *The High Cliff,* 271 Fed. 202, at page 7 of appellee's brief. It is there said that services in harbor cases *"where tugs are abundant"* carry a low rate. Abundance of assistance does not lose its value outside the harbor entrance. In fact, the cases cited by us in this connection for this Circuit, *The Monticello* and *The Wahkeena,* are not harbor cases.

Appellee also criticizes our citation of certain cases because they involve tugs. But, if assistance by a tug carries a lower rate when other tugs are available, and assistance by a steamer carries a lower rate when other steamers are available, surely the value of assistance by a fishboat is affected when another fishboat is standing by and has put a line on board. The improvement in the relative position of a vessel in distress brought about by the availability of two vessels to aid it, instead of one, remains the same. The principles applicable do not differ for fishboats.

Since concededly availability of other assistance "should not be ignored," counsel attempts to supply the lack of such consideration by providing it himself and, after weighing the evidence himself, comes up with the conclusion that the assistance offered by the SUNLIGHT was

not worth anything. Counsel's consideration is no substitute for consideration by the District Court.

But, since the failure of the trial court to consider this factor requires a re-appraisal of the award, counsel's argument as to the value thereof should be considered. His major premise is that extraordinary skill was required to free the PIONEER. His minor premise is that there is no evidence that the SUNLIGHT had such skill and would have employed the same maneuvers as were employed by appellee. His conclusion is that, since we can only conjecture as to what the SUNLIGHT could do, we cannot consider her help as of value.

The major premise that "The record is clear that ordinary seamanship could not do the job . . ." is supported by a reference only to pages 101 and 102 of the record, which contains only the testimony describing the breakage of the cable the first time. On a rising tide, the failure of a first attempt and the success of a second is no demonstration of any *need* for extraordinary skill, even if, in fact, the second maneuver was more skillful than the first. Counsel goes on to say "without great skill, a 5/8-inch cable could not stand the strain, nor was a purse seiner fishing vessel powerful enough."

There is no testimony to this effect in the record and counsel refers to none. The closest equivalent is testimony by appellee's expert, Captain Varnum, and appellants' expert, Captain Scheibe, that if the PIONEER was stranded with its bow waterline out of water 3 to 5 feet, as appellee's witnesses testified, the PIONEER *could not be pulled off at all* with such a wire, even by appellee's maneuver. [A. 162, 207]. We have already discussed this testimony in our opening brief at pages 39-40, and counsel has had nothing to say thereof. Its significance, as we there point out, is that it establishes the impossibility that the PIONEER was in the position claimed by appellee, and proves the primary significance of the rise in tide in causing the

success of the second attempt. This is directly contrary to counsel's contention as to the need for special skill.

Counsel's minor premise is that there is no evidence of special skill on the part of the SUNLIGHT. He claims a wisdom not possessed by the men on the spot. The master of the SUNLIGHT testified (as set forth on pp. 15-16 of our opening brief) from his familiarity with the SUNLIGHT that she was capable of assisting the PIONEER [A. 34]. He testified that the SUNLIGHT "had a regular towing bitt" [A. 34],—while on the other hand counsel apparently claims that the NORTH QUEEN was not equipped for towing. The men on the PIONEER promptly took a line to the SUNLIGHT upon her arrival. These seasoned mariners on the spot clearly thought her services of value.

The testimony of the SUNLIGHT was taken by deposition. At the time that deposition was taken no issue of special skill was tendered; for the libel claims no special services on the part of any seaman except the master—who appellants knew was an experienced fisherman. The flat testimony of the SUNLIGHT men is that they were able to help and, while appellee could well have attended at the deposition and tested this assertion by cross-examination as to their skill, he did not, and their testimony stands uncontradicted and unimpeached.

Counsel's conclusion is that since we do not know what assistance she would actually have rendered, it cannot therefore be an important element. But, this difficulty is inherent wherever availability of other aid is considered. Thus in *Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334, the other vessels considered were merely passing by—the court could not possibly have known their skill, yet it reduced an award in part because of this factor. One can never know whether other vessels present will prove to be more

skillful or less skillful in actual maneuvers, than the actual salvor. But, if others are present, the salvor can accept their aid instead of running unusual risks: if others are present, the danger of the assisted vessel is reduced because it is not limited to the means of a single boat: if others are present, less skill is needed because more power is available. Hence, under the cases, the availability of other assistance reduces the award. In the present case, the SUNLIGHT was there—it had gone so far as to take a line; it was in fact the first vessel to answer the distress call of the PIONEER. Its presence "should not be ignored." Yet it *was* ignored, and as this Court has pointed out, it is error to ignore so material a factor.

III.

Appellee's Contentions Point Up the Lack of Consideration of Danger to Salvor, Ability of PIONEER to Free Herself, Lack of Expense to the Salvor, and the Overemphasis on Appellee's Skill.

We have urged as further errors lack of consideration given to the freedom from danger of the salvor, to the ability of the PIONEER to free herself, to the very small expenditure of time and lack of expense by the salvor, and overemphasis of appellee's skill. These are all material factors under all of the decided cases. The contentions made by appellee only make more emphatic the deficiencies existing in these respects. We will take these up in order.

First: Lack of danger to the salvor was not considered.

There are no findings of danger to the salvor. Under Admiralty Rule 46½ the findings must contain the material facts upon which the judgment is based. In the absence of a finding, it certainly cannot be "presumed," as appellee suggests, that the court considered the assistance to be dangerous, and based its award on such danger.

(*The Fullerton* (C. C. A. 9), 211 Fed. 833.) And the court's opinion, if both the relevant paragraphs, quoted at pages 25 and 26 of our opening brief, be considered, rather than the single paragraph quoted by appellee, leaves no doubt that the court concluded, contrary to appellee's contention, that because of *"the distance separating the two vessels"* and *by "taking proper precautions to not submit the salvor to an unusual risk,"* the danger to be apprehended in a close approach to the "obstacles" which had brought the PIONEER to grief was avoided. Surely counsel does not contend that, when the court stated that it was rewarding appellee for its skill "to not submit the salvor to an unusual risk," it meant to reward the salvor for submitting to such risk.

On this question, as on the question of other assistance, appellee has sought to supplement a lack in the findings and opinion with its own contention concerning danger. But, the danger asserted by counsel as existing by reason of the NORTH QUEEN's approach to the PIONEER is based on unquestioning acceptance of the testimony of Messrs. Xitco and Berry that they approached within 300 to 400 feet of the PIONEER, in the face of the physical fact that over 200 fathoms, or over 1200 feet of line was taken out to the NORTH QUEEN. [A. 181, 171: See appellants' opening brief, p. 27.] On this fact no comment was made by appellee, nor do they comment on the obvious fact, already urged, that any potential danger was avoidable by the use of the fathometer. Counsel's contentions as to danger to rigging disregard the physical fact that the cable to the PIONEER was the weakest element used in the tow. [A. 212.] Appellee's contentions as to danger to life from collapse of the rigging, are unsupported by any evidence that there was anyone in any position to be injured by fall of the boom, which would have been the first portion of the structure to fall, if any did [A. 212]. And indeed, how can it be contended that the trial court

considered that there was danger to the rigging of the NORTH QUEEN, when the factor is not mentioned either in the court's opinion or the findings?

The award cannot thus be sustained on a basis contrary to the court's own opinion, in which, to repeat, the court, while correctly observing that appellee did *"not submit the salvor to an unusual risk,"* instead of considering lack of danger as an element which reduced the award, considered it as a phase of the question of skill, and used it to increase the award. And so there is no reference to danger in the findings, merely a reference to skill. Lack of danger is a material factor which, under the many cases cited in our opening brief, reduces the award.

Second: The trial court did not consider the ability of the PIONEER to free herself.

Appellee has, with commendable frankness, avoided any contention that the ability of the PIONEER to free herself was considered, and has confined himself to the argument that no such ability existed, or that it was speculative and should not be considered. Three points are made by appellee on this score: *first,* that the rise in tide to be anticipated was not enough; *second,* that the PIONEER would probably be holed by the rocks before she floated off; and, *third,* that she had tried once and failed.

The last of these arguments may be disposed of summarily. The fact that the PIONEER tried to back off at low tide, when she first struck, and failed, is hardly proof that she could not have succeeded on a higher tide. If there is anything to this argument, it would follow that because the NORTH QUEEN tried once to pull the PIONEER off, and failed, that a later attempt on higher tide must have failed. The PIONEER was not leaking, she made port under her own power; she would have tried again.

The argument that there would not have been a sufficient rise in tide is rested on the testimony of appel-

lee's witnesses that the bow was from 3 to 5 feet out of water when the NORTH QUEEN came up. But this testimony is contrary to that of the man in the skiff of the PIONEER, who were *at the bow of the* PIONEER at the very point which was to be observed, and who stated that the waterline was then a foot to a foot and a half out of water immediately after the time the PIONEER struck. It is contrary to the testimony of Captain Varnum, appellee's expert, and our expert, Captain Scheibe, who testified that the PIONEER could not have been pulled off if the PIONEER was in such a position (see our opening brief at pp. 39-40, which is unanswered on this score). Berry's and Xitco's testimony was not believed by the court, who stated that those who operated the NORTH QUEEN "were not concerned with measurements," and that "whether it was five feet or one foot, I believe it was somewhere between those two." [A. 52.] Whatever appellee's witnesses may have thought they saw when they put their searchlight on the PIONEER from a distance of hundreds of feet out to sea, they can hardly have made any accurate observation as to the level of the waterline of the PIONEER.

The only credible testimony as to the position of the PIONEER's waterline is that of the men in the skiff who were at the waterline and who could see it, and who said that it was a foot to a foot and a half out. Theirs is the only testimony placing the PIONEER in a position which is consistent with the fact that the PIONEER was actually released. This testimony establishes that a five foot rise of tide would be more than enough to float the PIONEER (for the testimony was that the waterline is normally about 6 inches out of water) [A. 83]. In point of fact the time elapsed between the stranding and the floating of the PIONEER, a period of about an hour and a half, is about a quarter of the time for the full time foot rise, and a rise of a foot or so is almost exactly the

amount needed to float the PIONEER. As Captain Scheibe testified, the tide was the principal factor in freeing the PIONEER [A. 207]. It is impossible that much longer could have been required to enable the PIONEER to back off.

The same facts defeat the contention that great damage would have been done to the PIONEER had she waited until floated by the tide. For the expert testimony relied on by appellee in this connection was all founded on the assumption that a substantial further period of time would have to elapse before the PIONEER could float enough to pull off under her own power, which assumption is, as we have seen, contrary to the evidence. Barry and Xitco made this assumption, then based their testimony of course on their prior errors with respect to the position of the PIONEER. Berry in fact testified that a 12 or 15 foot tide would be needed [A. 142]. Varnum was required to assume the truth of the same erroneous information [A. 154]. These errors were the basis of the testimony that a rise in tide would not free the PIONEER but, by increasing its motion would increase damage on the rocks. Mr. Lande's cross-examination of Captain Scheibe, on which he places so much weight (see appellee's brief at p. 26) relates to the damage to be expected "before she came free at high tide," and to damage from a future rise in tide giving buoyancy without freeing, without regard to the fact that the significant rise in tide was not to come in the future, but had occurred in the past when the PIONEER came off, and without regard for the fact that there was no apparent reason why the PIONEER should not float off long before high tide. There were other errors in the assumptions of appellee's witnesses, which are pointed out in our opening brief. This whole mass of testimony ceases to have significance in view of these erroneous assumptions. The PIONEER did not go aground with her bow 3 to 5 feet out of water, as these witnesses were required to assume. It was not nec-

essary to wait for high tide, as Mr. Lande required Captain Varnum and Captain Scheibe to assume, for the PIONEER to float. A ten or twelve foot tide was not required to float the PIONEER,—a one to two foot tide did the job very well. For, as Captain Scheibe testified [A. 207], before the PIONEER could be freed with the equipment of the NORTH QUEEN and the line of the PIONEER, it was essential that the PIONEER be partly freed by the tide.

Some emphasis is placed by appellee on the damages suffered by the PIONEER while on the rocks. But, as Captain Scheibe testified [A. 30], this damage could have been done when she struck, and, since she struck at eight knots, obviously a great deal of damage must have been done then. The damage was largely to the keel, on which she struck. All witnesses agreed that there was only a very gentle swell, rocking the PIONEER slightly—a matter of five to ten degrees. Such gentle rocking could of course crush the strainers, to which appellee has referred, which are on the bottom, six feet from the keel, and damage to them is certainly no indication of projecting rocks which might puncture the hull. The master of the PIONEER testified that she was not pounding. (Indeed, if the PIONEER had been pounding her planking on rock for an hour and a half, she would hardly have been free from leaks.) The argument that rocks which had not damaged the planking of the PIONEER theretofore would appear and puncture the planking stretches probability altogether too far.

The weather was good: the tide had reached the point when the PIONEER was nearly ready to come off and so, with a rusty 5/8-inch steel cable, she could be pulled off. Under these circumstances, the probability that she would shortly free herself should have been considered.

Ulster S. S. Co. v. Cape Fear Transportation Co., 94 Fed. 214.

This same set of errors dominated the third factor here considered, which is,

Third: That skill was given excessive emphasis.

We have observed, in our opening brief, that the trial court, both in the findings and in its opinion, substitutes for consideration, in place of the question whether this salvage is of a high degree of merit, the question whether it rises to the dignity of a high degree of skill. Skill is not the equivalent of merit, for, in the determination of merit, many factors are involved—including danger, time and expense, and the whole catalogue of relevant factors. As is held in *The Naiwa* (C. C. A. 4th), 1924 A. M. C. 1432, skill does not alone give rise to a high award.

Appellee distinguishes *The Naiwa* on the ground that, in that case, the skill was that of a salvage firm. That does not make the cases distinguishable. The skill of salvage firms, which invest large sums of money, and train and maintain large crews exclusively for salvage purposes, deserves and receives special reward (*The Kia Ora* (C. C. A. 4th), 252 Fed. 507). Appellee himself claims special reward because of Berry's experience. But the purpose of salvage awards is to encourage like services on future occasions. (*De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873.) This policy would hardly be served if a high reward is given for the skill alone of an experienced salvage man accidentally aboard a fishboat, as against a low reward for skill alone on the part of salvage personnel on specialized salvage equipment maintained at great expense. Hence, under *The Naiwa, supra*, even if Berry's special skill would properly be decided to be the sole cause of the salvation

of the PIONEER. In the absence of hardship or danger, appellee's service for so brief a time would carry no high reward.

But, in deciding the case, the trial court omitted deciding the one fact that would have enabled it to decide how important Berry's services were. For, as we have seen, the trial court did not decide how far the PIONEER was out of water when she struck. As to this, to repeat our earlier quotation, the court said simply,

> "But whether it was five feet or one foot, I believe it was somewhere between these two." [A. 52.]

Without deciding this question, it was impossible for it to do more than guess at the relative significance of appellee's maneuvers, as against the significance of the tide. Had the evidence of the PIONEER's position been considered, and this point decided, for the reasons stated before, there could have been no conclusion save the PIONEER struck with her waterline a foot or so out of water. The conclusion that the rise in tide, not Berry's skill, was the cause of the difference between the success of the first and the second attempt to free the PIONEER, would inevitably have followed. Thus, the dismissal by the trial court, as merely speculative, of the real evidence of the PIONEER's ability to free herself, resulted not merely in an overemphasis on skill, but on a total inability to do more than speculate on what skill had to do with freeing the PIONEER.

Fourth: The trial court erred in failing to consider the lack of expense to the appellee.

On this aspect of the case, we are content to rest on the argument made in our opening brief.

IV.

The Award Is Palpably Excessive: The Fact That Vessel Values Are Today Inflated Does Not Mean That Salvage Awards Are Larger in Proportion to Values.

In our opening brief we cited many cases involving more or less comparable services to stranded vessels. We discussed their facts fully and compared the awards with those in the present case. Those cases show that $12,000 is far too much money for less than two hours fair weather pulling against a stranded vessel of the PIONEER's value. In the cases closest as to value and service, the awards were reduced to well below that here made, although periods of service were far greater. We think those cases stand on their own feet, and we are not going to extend this brief by discussing specifically each of appellee's attempted distinctions thereof. Counsel has, however, a few stock grounds of distinction which we will briefly mention.

First: Counsel objects to many of those cases on the ground that many of them involve tugs, whose primary business is towing. But, over counsel's strenuous objections, we proved by Captain Joncich's testimony that towage of one fishboat by another is common [A. 172, 173]. We have submitted the cases in our brief, not because they are tugboat cases, or steamboat cases, or sailboat cases, but because they are *stranding* cases, or other classes of comparable service, and because they involve either statements of principle of significance here, or because they show what sort of an award requires reduction. Some involve tugs, others such as *De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873; *Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334, do not. Some involve specially equipped salvage tugs which, as pointed out heretofore,

are apparently entitled to special reward. Apart from this factor, which certainly does not aid appellee, no distinction of principle between tugs and other vessels is made in the cases. A simple towing operation is not, of course, as many of them point out, unusual for a tug; but neither, for that matter, from the testimony is it unusual for a fishboat. There might be something to such a distinction, had the decision in this case been rested on appellee's contentions as to danger to his vessel from pulling. But such was not the case and, on the evidence, as we have seen, there is not much to the contention. A fishboat, as such, is certainly not entitled to a higher reward than a tug for salvage services.

Second: Appellee attempts to distinguish many of the cases we have cited on the theory that in those cases there was no special element of danger, skill or seamanship. The cases do not actually speak of absence of skill or seamanship, but rather of absence of danger or heroism. The presence of skill does not, as we have seen, justify a high award, and the exceptional elements justifying a high award are peril, unusual expense, gallantry or heroism. (*The Naiwa, supra*; and see the various quotations on pages 29-35 of our opening brief.) For present purposes this probably does not greatly matter. For what was done in those cases is pretty much what appellee did in this case, and, to the extent that skill, heroism, and danger were lacking in those cases, it is lacking here. The only difference is that all of those cases involved days of labor instead of less than two hours as in this case.

Third: It is suggested that the dollar is not worth what it used to be, hence that where saving a $100,000 vessel once carried a $4,200 award (in *The Hesper,* see appellee's brief at page 17), a $12,000 award is now proper for a service to a vessel of like value. Presumably in 1960 a $20,000 award will be proper for salving

a $100,000 vessel and some day a $100,000 award. We should have thought the fallacy in that argument was apparent enough to preclude its presentation. Surely it must be clear that the ordinary standards applied in determining a salvage award vitiate any such notion. One of the principal factors in determining a salvage award is the *value* of the salved craft. The same inflation that decreases the value of dollars in which the salvor is paid *increases the value of the boat salved and the salving craft.* To take a simple example, it is quite doubtful that the purse seiners involved in this case would have been worth half the amount involved in this case before the second world war. In the days of *The Hesper,* the PIONEER would hardly have been worth a tenth of the amount of its present value. Appellee apparently asks that he be given an amount equal in real value to the value of the award in *The Hesper* case, which was made in 1883 dollars. But, if this discount scale is to be applied to the current value of the currency, both parties must have the benefit thereof. Is appellee willing to reduce the value of the PIONEER to ten or twenty thousand 1883 dollars?

In point of fact, due to the development of modern aids to navigation, of the radio, and because of the omnipresence of power vessels, the awards have tended to decrease as the years have gone by. (*The Manchester Brigade* (D. C. Va.), 276 Fed. 410; *The Eastern Glen,* 11 F. Supp. 995.) In the present case, we have another such aid, the fathometer, operating to reduce the risk. In *The Kia Ora,* 252 Fed. 507, where the factor of inflation was mentioned, the service reduced involved the maintenance of a complete wrecking service, and the increased cost thereof may have been affected by inflation. Despite the case's mention of this factor, the award was closely comparable to other awards for like services made in cases cited. If *The Kia Ora* be treated as stating any general prin-

ciple favoring the consideration of inflation beyond its effects on the values involved, we respectfully submit that it cannot be followed. There can be no rule that as the years go by, and the value of the dollar declines, and the value of ships therefore goes up, salvage awards get larger and larger in proportion to the value of the ship salved. There would soon be naught for the owner. The salvor gets the benefit of inflation once in the increased value of the salved craft. He is not entitled to get it twice.

Finally, appellee mentions eight cases which, it is suggested, may be more helpful than those we have cited. Their facts are not stated, nor is it stated in what respect they are deemed comparable.

In the first, *Dalzell v. Central Union Stockyards, et al.*, (D. C., S. D. N. Y.), 1935 A. M. C. 1048, 12 F. Supp. 179, the salving tug secured itself alongside a sinking barge so that, if the barge sank, the tug would have been capsized. We have no comparable danger incurred by appellee, and the services are not similar in nature. And the award was much smaller in that case.

The next case, *The Commonwealth*, 1932 A. M. C. 199 (W. D. Wash.), is unreported officially, or unofficially, but A. M. C. prints an abstract indicating that, for three days' services to a stranded powerless fishing boat, valued at $12,000, a total of $1,500 was awarded. The values in our case are slightly less than ten times the values in that case. Counsel apparently assumes that this demonstrates his right to an award of slightly less than ten times the award made in that case. But, of course, the awards made do not rise arithmetically with the increase in the values; and, moreover, that three day service can hardly be compared to two hours' services to a vessel capable of making port under her own power.

Rustad v. Wuori (*The Melody*), 157 F. (2d) 448, is a decision of this Circuit Court of Appeals. We have al-

ready referred to that case on page 59 of our opening brief. That case involved an award of $4,300, using a salved value of $19,500, for services over a period extending over two days to a sinking derelict. (Services to a derelict are always valued at a higher basis than normal salvage services.) A loss to the salvor in the amount of $3,000 to $5,000 through loss of fish was proved because of damage to tackle in the assistance. It was thus impossible in that case, due to the low values, adequately to compensate the salvor at all. Heroism was involved in that one of the seamen boarded the wreck and fixed the towline below water while standing on the MELODY's submerged deck with water to his shoulders. Despite the difference in values, we do not see how the present case could justify an award of three times the amount paid in the MELODY, for none of the special circumstances of loss, danger, or time expended, present in the MELODY, are present in this case.

The case of *The Wahkeena* (C. C. A. 9th), 56 F. (2d) 836, and the case of *De Aldamiz v. Th. Skogland & Sons,* 17 F. (2d) 873, have already been fully discussed by us in our opening brief at pages 17 and 19. In both *The Kia Ora,* 252 Fed. 507, 511, and *The Craster Hall,* 213 Fed. 436, the values involved and the expenditure of time and energy far exceeded those with which we are concerned.

Last, but not least, appellee cites *The Clevelander,* 1933 A. M. C. 1557 (D. C., E. D. N. Y.), of which also only an abstract is reported. In this case the CLEVELANDER, valued at $135,159—$33,000 more than the PIONEER, was pulled off a strand by two vessels worth $90,000. The service involved "some difficulty" and were rendered on a rising tide. After the CLEVELANDER was pulled off, she had to be towed into port. Four hours' services were involved. $5,000 was awarded. We are quite willing to agree with appellee as to the comparability of that case

with this case. It is altogether comparable, and the award made in it is not greatly excessive. We do not see how it helps appellee. It would indicate that something between $2,500 and $3,500 would be adequate in this case.

Conclusion.

There is nothing in this case to justify an award of $12,000 for about two hours' services in calm and clear weather. Appellee has cited no authority sanctioning such an award. Those we have discussed show that the award is grossly excessive and should be reduced. We believe that the reduction should be on the scale indicated in our opening brief.

Respectfully submitted,

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